

A Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO W-02(A)-696-06 OF 2020
LAU BEE LAN, ABU BAKAR JAIS AND GUNALAN MUNIANDY JJCA
2 JULY 2021

C *Statutory Interpretation — Construction of statutes — Mandatory or discretionary — Clauses (1) and (2) of r 16.11 of ACE Market Listing Requirements ('ACE LR') set out circumstances when Malaysian Stock Exchange ('MSE'), respectively, 'may' and 'shall' de-list a listed corporation — Whether provision in winding cl (2)(d) of r 16.11 that MSE 'shall' de-list a listed corporation upon its winding up denoted that such action was mandatory*
D *— Whether MSE did not have the discretion not to de-list the corporation on the ground that a challenge to the winding up order was pending in court — Whether juxtaposition of cll (1) and (2) of r 16.11 ACE LR showed that drafters of ACE LR clearly intended de-listing to be mandatory if any one of the circumstances under winding cl (2) existed*

E The respondent was appointed as the liquidator of a public-listed company ('Wintoni') following its Court-ordered winding up. Wintoni was on the appellant's Official List and subject to the ACE Market Listing Requirements ('ACE LR') made pursuant to the Capital Markets and Securities Act 2007 ('CMSA'). In a letter of undertaking ('LOU') to the appellant following his appointment as liquidator, the respondent stated that in consideration of the appellant allowing Wintoni to continue to remain on the Official List despite its winding up, he would comply with the ACE LR in so far as the same applied to him. The respondent subsequently announced that since Wintoni had ceased to function, he would not be preparing the company's annual reports and audited financial statements and auditors' and directors' reports for the financial year ending 31 December 2016 and thereafter. After querying Wintoni's non-submission of its financial statements, the appellant's Listing Committee ('LC') issued a public reprimand against the respondent under r 16.19(1)(b) of the ACE LR for failing to submit the company's quarterly financial statements and reports. In his appeal to the appellant's Appeals Committee ('AC'), the respondent said he could not be expected to prepare the financial statements and reports when Wintoni had ceased operations. The respondent pointed out that the appellant ought to have de-listed Wintoni upon its winding up. The AC dismissed the appeal and notified the respondent that: (a) it was not mandatory for the appellant to de-list Wintoni upon its winding up and that it had the power and discretion not to de-list pending the outcome of court proceedings to set aside the winding up order; (b) so long as Wintoni remained on the appellant's Official List, the company was required to

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comply with the ACE LR for the benefit of investors; and (c) as the Controlling Person of Wintoni and also based on his LOU, the respondent was statutorily obliged to ensure the company's due compliance with the ACE LR. The respondent filed a judicial review ('JR') application to quash both the LC's and the AC's decisions and to direct the appellant to announce that the public reprimand against him had been nullified and invalidated. The High Court allowed the JR application holding that, inter alia: (i) r 16.11(2) of the ACE LR mandatorily required the appellant to de-list Wintoni upon its winding up; (ii) the LOU was void for breaching the Companies Act; and (iii) the obligation to prepare the financial statements of the company lay with the company's directors and not

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Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) There was a difference between cll (1) and (2) of r 16.11 of the ACE LR concerning the circumstances where the appellant 'may de-list' (in the former) and 'shall de-list' (in the latter) a listed corporation. The drafters of the ACE LR clearly distinguished the circumstances where discretion could be exercised when the word 'may' was used, and where it was mandatory and non-negotiable when the word 'shall' was employed. The existence of cll (1) and (2) of r 16.11 placed in such a successive fashion within one legal provision, namely r 16.11, clearly without a doubt showed the clear intent of the drafters of the ACE LR. Given that the word used in the legislation was precise and without any ambiguity, the interpretation to be adopted should be literal and strict and not purposive. Accordingly, the word 'shall' in r 16.11(2) was to be construed as mandatory and the appellant could not exercise any discretion except to immediately de-list Wintoni from the Official List upon its winding up. The appellant's argument that it could exercise its power under r 2.07(2) ACE LR to waive the mandatory requirement was irrational, unreasonable and illegal (see paras 14–19 & 25).

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(2) The respondent's LOU was not a blanket, unqualified and unconditional undertaking to comply with the ACE LR. On the contrary, it was qualified by the words 'in so far as the same apply to me' (see para 24).

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(3) Given the Court's finding that the requirement to de-list Wintoni was mandatory, it followed that (i) there was no duty on the respondent to ensure Wintoni's compliance of timely issuance of the Financial Statements pursuant to r 2.05(2)(a) ACE LR, to comply with rr 9.22 and 9.23 ACE LR as it was the LC's decision that these obligations only remained in place as long as Wintoni remained listed, and (ii) it could not be said that the respondent had breached r 2.22(3)(a) and (b) ACE LR due to Wintoni's failure to announce or issue the Financial Statements as

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- A the LC found (and upheld by the AC) because the respondent had provided the LOU in his capacity as a Controlling Person pursuant to r 2.22 ACE LR (see para 25).
- B (4) As found by the High Court, the decisions of the LC and AC were tainted with illegality, error of law and irrationality such that the decisions were amenable to judicial review. The High Court had correctly allowed the judicial review application and there were no merits in the appeal that warranted appellate intervention (see paras 27–28).
- C **[Bahasa Malaysia summary]**
Responden telah dilantik sebagai pelikuidasi bagi sebuah syarikat tersenarai awam ('Wintoni') berikutan perintah penggulungan Mahkamah. Wintoni tersenarai dalam Senarai Rasmi perayu dan tertakluk kepada Kehendak Penyenaraian Pasaran ACE ('ACE LR') yang dibuat berdasarkan Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP'). Dalam satu surat akujanji ('LOU') kepada perayu berikutan pelantikannya sebagai pelikuidasi, responden menyatakan bahawa sebagai balasan kepada perayu yang membenarkan Wintoni untuk terus kekal dalam Senarai Rasmi meskipun telah digulung, beliau akan mematuhi ACE LR setakat mana ianya terpakai kepada beliau.
- D Responden kemudiannya mengumumkan bahawa memandangkan Wintoni tidak lagi beroperasi, beliau tidak akan menyediakan laporan-laporan tahunan syarikat dan penyata-penyata kewangan yang diaudit serta laporan juruaudit-juruaudit dan pengarah-pengarah untuk tahun kewangan berakhir 31 Disember 2016 dan berikutnya. Setelah menyoal Wintoni yang tidak menyerahkan penyata-penyata kewangannya, Jawatankuasa Penyenaraian perayu ('LC') telah mengeluarkan teguran awam terhadap responden di bawah peraturan 16.19(1)(b) ACE LR kerana gagal untuk menyerahkan penyata-penyata kewangan suku tahunan dan laporan-laporan syarikat. Dalam rayuannya kepada Jawatankuasa Perayu ('AC') perayu, responden mengatakan beliau tidak boleh diharap untuk menyediakan penyata-penyata dan laporan-laporan kewangan apabila Wintoni telah berhenti beroperasi. Responden menyatakan bahawa perayu seharusnya telah membatalkan penyenaraian Wintoni setelah penggulungannya. AC telah menolak rayuan tersebut dan memaklumkan kepada responden bahawa: (a) ia bukanlah mandatori bagi perayu untuk membatalkan penyenaraian Wintoni setelah penggulungannya dan bahawa ia mempunyai kuasa dan budi bicara untuk tidak membatalkan penyenaraian sementara menunggu keputusan prosiding mahkamah untuk mengetepikan perintah penggulungan; (b) selagi Wintoni kekal dalam Senarai Rasmi perayu, syarikat tersebut dikehendaki mematuhi ACE LR demi kepentingan pelabur-pelabur; and (c) sebagai Pegawai Penguasa Wintoni dan juga berdasarkan LOU, responden bertanggungjawab di bawah undang-undang untuk memastikan syarikat mematuhi ACE LR dengan sewajarnya. Responden telah memfailkan permohonan semakan kehakiman ('SK') untuk membatalkan keputusan kedua-dua LC dan AC dan untuk
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mengarahkan perayu untuk mengumumkan bahawa teguran awam terhadapnya telah dibatalkan dan menjadi tidak sah. Mahkamah Tinggi membenarkan permohonan SK dan memutuskan bahawa, antara lain: (i) peraturan 16.11(2) ACE LR mewajibkan perayu untuk membatalkan penyenaraian Wintoni setelah penggulangannya; (ii) LOU dibatalkan kerana melanggar Akta Syarikat; dan (iii) kewajipan untuk menyediakan penyata-penyata kewangan syarikat terletak pada pengarah-pengarah syarikat dan bukan dengan pelikuidasi. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

- (1) Terdapat perbezaan antara klausa (1) dan (2) peraturan 16.11 ACE LR mengenai keadaan di mana perayu 'boleh membatalkan penyenaraian' (yang terdahulu) dan 'hendaklah membatalkan penyenaraian' (dalam terkini) sebuah perbadanan yang tersenarai. Orang yang merangka ACE LR dengan jelas telah membezakan keadaan di mana budi bicara boleh dilaksanakan apabila perkataan 'boleh' digunakan, dan di mana ia wajib dan tidak boleh dirunding apabila perkataan 'hendaklah' digunakan. Kewujudan klausa (1) dan (2) peraturan 16.11 yang diletakkan sedemikian secara berturut-turut dalam satu peruntukan undang-undang, iaitu peraturan 16.11, jelas tanpa keraguan menunjukkan niat jelas orang yang merangka ACE LR. Memandangkan perkataan yang digunakan dalam perundangan tersebut adalah tepat dan tanpa kesamaran, tafsiran yang harus diterima pakai hendaklah literal dan tegas serta tidak bertujuan. Dengan demikian, perkataan 'hendaklah' dalam peraturan 16.11(2) harus ditafsirkan sebagai wajib dan perayu tidak boleh menggunakan apa-apa budi bicara kecuali untuk segera membatalkan penyenaraian Wintoni dari Senarai Rasmi setelah penggulangannya. Hujahan perayu bahawa ia boleh menggunakan kuasanya di bawah peraturan 2.07(2) ACE LR untuk menepikan syarat wajib adalah tidak rasional, tidak munasabah dan menyalahi undang-undang (lihat perenggan 14–19 & 25).
- (2) LOU responden bukanlah suatu akujanji yang menyeluruh, tanpa kelayakan dan tanpa syarat untuk mematuhi ACE LR. Sebaliknya, ia dihadkan dengan perkataan "in so far as the same apply to me" (lihat perenggan 24).
- (3) Memandangkan dapatan Mahkamah bahawa kehendak untuk membatalkan penyenaraian Wintoni adalah wajib, maka (i) tidak ada kewajipan pada responden untuk memastikan kepatuhan Wintoni dalam mengeluarkan Penyata-Penyata Kewangan dalam masa berdasarkan peraturan 2.05(2)(a) ACE LR, untuk mematuhi peraturan 9.22 dan 9.23 ACE LR kerana ianya adalah keputusan LC bahawa

- A kewajipan ini hanya terpakai selagi Wintoni masih disenaraikan, dan (ii) ianya tidak boleh dikatakan bahawa responden telah melanggar peraturan 2.22 (3)(a) dan (b) ACE LR disebabkan oleh kegagalan Wintoni untuk mengumumkan atau mengeluarkan Penyata-Penyata Kewangan sebagaimana yang didapati oleh LC (dan dikekalkan oleh AC)
- B kerana responden telah menyerahkan LOU dalam kapasitinya sebagai Pengawai Penguasa menurut peraturan 2.22 ACE LR (lihat perenggan 25).
- C (4) Sebagaimana yang didapati oleh Mahkamah Tinggi, keputusan-keputusan LC dan AC dicemari dengan kepenyalahan undang-undang, kekhilafan undang-undang dan tidak rasional yang membolehkan keputusan-keputusan tersebut dipinda melalui semakan kehakiman. Mahkamah Tinggi telah dengan tepat membenarkan permohonan semakan kehakiman dan tidak ada merit dalam rayuan yang membenarkan campur tangan mahkamah rayuan (lihat perenggan 27–28).]
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Cases referred to

- E *Akira Sales & Services (M) Sdn Bhd v Nadiyah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 2 CLJ 513, FC (refd)
Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1, FC (refd)
- F *Benjamin William Hawkes v Public Prosecutor* [2020] 5 MLJ 417, FC (distd)
Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA)) [2018] 2 MLJ 738, CA (refd)
Guan Teik Sdn Bhd v Hj Mohd Noor bin Hj Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)
- G *Hee Nyuk Fook v Public Prosecutor* [1988] 2 MLJ 360, SC (refd)
Ho Kean Pin v Malayan Banking Berhad & Anor [2020] MLJU 1435, HC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)
- H *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union* [1995] 2 MLJ 317, CA (refd)
Tan Sri Dato' Hj Lamin bin Hj Mohd Yunus v Bursa Malaysia Securities Bhd [2012] 6 MLJ 182, CA (refd)
- I *Tan Sri Dato' Hj Lamin bin Hj Mohd Yunus v Bursa Malaysia Securities Bhd* [2012] 7 MLJ 85, HC (refd)
Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal [2013] 1 MLJ 158, CA (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 11, 354(2)(j)
Companies Act 2016 ss 477, 480, 483, 484, 489, 514
Criminal Procedure Code ss 158(ii), 51A(1)

Appeal from: Application for Judicial Review No WA-25-362-08 of 2019 (High Court, Kuala Lumpur)

Preetha Pillai (Nimalan Devaraja and Tiang Wen En with her) (Skrine) for the appellant.

Mohd Faizal Khalid (Afifah Afifbt Azman with him) (Sabri Ahmad & Co) for the respondent.

Lau Bee Lan JCA:**INTRODUCTION**

[1] This is an appeal from the appellant against the decision of the High Court dated 15 June 2020 allowing the respondent's judicial review application primarily for the following orders:

- (a) a certiorari order to quash the appellant's listing committee's decision dated 18 December 2018 ('LC decision') and appeals committee's decision dated 6 May 2019 ('AC decision'); and
- (b) a mandamus order to direct the appellant to issue an announcement that the public reprimand imposed against the respondent by the appellant be nullified and declared invalid within 14 days from the date of the court's order. This order was upheld by the AC.

[2] Having considered the respective parties' written submissions and the oral arguments and the relevant records of appeal, we had dismissed the appeal with costs. These are our reasons in respect of the said decision.

BACKGROUND FACTS

[3] The facts relevant to this appeal are as follows:

- (a) the appellant is the regulator of the Malaysian capital market and maintains, among others, the main market and ACE Market. Section 11 of the Capital Markets and Services Act 2007 (Act 671) ('the CMSA') empowers the appellant to put in place a comprehensive and effective regulatory and supervisory framework to regulate the market and its participants, among others, through the issuance of the listing requirements ('LR') for various markets including the ACE LR;
- (b) s 354(2)(j) of the CMSA provides for persons to whom the LR apply to

- A** comply with and observe the same. Paragraph 2.05, ACE LR provides that: (a) a listed issuer by virtue of its admission to the official list is bound by the ACE LR; and (b) a listed issuer, its directors, officers, advisers, a controlling person (as defined under the ACE LR) which includes a liquidator and any other person to whom the ACE LR is directed must comply with the ACE LR for so long as the listed issuer or its securities remain listed on the official list, even during the period when the listed issuer's securities are suspended from trading;
- B**
- C** (c) para 2.04, ACE LR sets out the principles upon which the ACE LR are based, which includes the requirement that investors and the public will be kept fully informed by the listed issuers of all facts or information that might affect their interests and in particular, full, accurate and timely disclosure will be made of any information which may reasonably be expected to have a material effect on the price, value or market activity in the securities of listed issuers;
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- (d) it is settled law that the LR issued pursuant to the CMSA 'has statutory force in the form of rules containing obligations and requiring compliance by participating organisations pursuant to the (CMSA)'. as held by this court in *Tan Sri Dato' Hj Lamin bin Hj Mohd Yunus v Bursa Malaysia Securities Bhd* [2012] 6 MLJ 182 (see also *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158);
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- F** (e) Wintoni is a public listed company listed on the appellant and was under the supervision of the appellant pursuant to the ACE LR and the CMSA as alluded to above;
- (f) the respondent was appointed as liquidator pursuant to a Kuala Lumpur High Court Winding Up Order dated 17 August 2017. Proceedings were commenced shortly thereafter to challenge the winding up order;
- G**
- (g) on 20 September 2017, the respondent provided an undertaking to the appellant in the form of a letter of undertaking ('LOU') bearing the same date with the following contents:
- H** Compliance with ACE Market Listing Requirements
- # I We, Mohd Afizan Bin Husain I/C No 670821-03-5159, am a Liquidator of Wintoni Group Berhad (In Liquidation) ('Company') which # has/have been admitted to and is currently listed on the Official List of Bursa Malaysia Securities Berhad ('Bursa Securities').
- I** *In consideration of Bursa Securities allowing the continued listing of the Company on the Official List, # I We, UNDERTAKE AND AGREE to comply with Bursa Securities ACE Market Listing Requirements, including any amendment as may be made from time to time, in so far as the same apply to # me/us.* (Emphasis added.)

- There is a dispute between the parties as to the purpose of the LOU which we shall address later; **A**
- (h) on 31 October 2007 the respondent made a general announcement to state, among others, that the respondent would not prepare Wintoni's annual reports that include annual audited financial statements together with the auditors' and directors' reports for the financial year ended ('FYE') ended 31 December 2016 and any subsequent financial periods; **B**
- (i) on 13 March 2018, the appellant conducted an inquiry against Wintoni pertaining to the delay in the announcement of Wintoni's QR 3/2017 and QR 4/2017 which were due on 30 November 2017 and 28 February 2018 respectively and sought explanations for the non-issuance of the same and the arrangements that were being made to do so from the respondent; **C**
- (j) on 15 March 2018, the respondent responded that it was not his role or function as liquidator and as Wintoni has ceased operations, he was not in a position to prepare the financial statements ie annual report for FYE 30 June 2016, QR 3/2017 for FYE 30 September 2017, QR 4/2017 for FYE 3 December 2017, QR 1/2018 for FYE 31 March 2018, QR 2/2018 for FYE 30 June 2018; **D**
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- (k) on 20 March 2018, the appellant requested information whether he had delegated the function of preparing the financial statements to the directors of Wintoni;
- (l) on 21 March 2018, the respondent responded to the appellant stating, among others, that the respondent did not delegate compliance with the ACE LR to the directors and neither did he have any arrangement with the directors, management or any agent; **F**
- (m) on 10 October 2018, the appellant issued a LC Memo to the respondent, giving notice on the proposed enforcement action, specifying the nature and particulars of the breach of the ACE LR; **G**
- (n) via a letter dated 9 November 2018 the respondent responded to the appellant's notice by reiterating his representations set out in his emails on 15 March 2018 and 21 March 2018 alluded above; **H**
- (o) after deliberation, on 18 december 2021, the LC's decision was communicated by the appellant to the respondent which is summarised in the appellant's submission as follows:
- (i) Wintoni, as a listed corporation on the ACE Market has the obligation, pursuant to r 2.05(2)(a), ACE LR to comply with rr 9.22 and 9.23, ACE LR to ensure timely issuance of the financial statements. These obligations remain in place as long as Wintoni remains listed; **I**

- A** (ii) the respondent was found to have breached r 2.22(3)(a) and (b), ACE LR due to Wintoni's failure to announce or issue the financial statements. The power to run and manage Wintoni was vested with the respondent upon his appointment as liquidator. The respondent had provided the LOU to the appellant in his capacity as a controlling person pursuant to r 2.22, ACE LR;
- B**
- (iii) s 480 of the Companies Act 2016 (Act 777) ('the Companies Act') imposes a duty on the respondent to observe all requirements imposed on him by 'any written law or otherwise.' The ACE LR is part of the requirements imposed on the respondent and has statutory force;
- C**
- (iv) the appellant decided to impose a public reprimand on the respondent under r 16.19(1)(b), ACE LR and directed the respondent to make the necessary arrangements to ensure the announcement or issuance of the financial statements; and
- D**
- (v) the respondent was advised that any appeal ought to be made by 28 December 2020.
- E** (p) the respondent appealed against the LC's decision in an email dated 12 January 2019 stating therein the following:
- (i) that his duties are limited to those under s 514 of the Companies Act: to prepare for the statement of receipts and payments of Wintoni for the period of six months from the date of his appointment as liquidator and of every subsequent period of six months. The respondent cannot be expected by the appellant to prepare quarter financial statements for purpose of announcement to Bursa Malaysia;
- F**
- (ii) his withdrawal of the LOU stating that it was signed for the respondent to obtain the user ID so that the announcement of Wintoni's winding up status could be made;
- G**
- (iii) the respondent cannot be expected by the appellant to continue making quarterly announcements when Wintoni had ceased operations;
- H**
- (iv) that the appellant ought to have delisted Wintoni as it had been wound up; and
- (v) that the respondent would be applying to the winding up court for directions.
- I** (q) on 6 May 2019, the appellant conveyed the AC's Decision which upheld the LC's Decision to the respondent. In its decision, the AC stated, among others, the following as summarised in the appellant's submission:

- (i) it was not mandatory for the appellant to de-list Wintoni upon the winding up order being made which is in accordance with the appellant's statutory duties under s 11 of the CMSA and r 2.07(2), ACE LR; A
- (ii) notwithstanding the winding up order, the appellant had the power and discretion not to de-list Wintoni pending the final disposal of the court proceedings as the latter could potentially negate or suspend the effects of the winding up order; B
- (iii) as the appellant was entitled to and empowered to maintain Wintoni's listing status, the respondent, as the controlling person of Wintoni and having provided the appellant with the LOU, was bound to comply with the ACE LR as long as Wintoni remained on the appellant's official list and was bound to ensure Wintoni's compliance with the ACE LR. C
- (iv) the respondent, pursuant to s 480 of the Companies Act, has a duty to observe all the requirements imposed on him as liquidator by any written law or otherwise, including the ACE LR; and D
- (v) in respect of the attempted withdrawal of the LOU, the respondent's breaches of the ACE LR were committed prior to the revocation or withdrawal of the LOU. E

HIGH COURT'S DECISION

[4] On 17 September 2019, the respondent commenced judicial review proceedings against the LC's decision and AC's decision. F

[5] On 15 June 2020, the learned High Court judge allowed the respondent's judicial review application broadly, on the following grounds: G

- (a) the obligation to prepare the financial statements was not within the duties of a liquidator as prescribed under the Companies Act but instead was that of the directors of Wintoni by relying on the case the High Court decision of *Tan Sri Dato' Hj Lamin bin Hj Mohd Yunus v Bursa Malaysia Securities Bhd* [2012] 7 MLJ 85 at pp 99 paras [32], 100 [34] and 101 [35] which was affirmed by the Court of Appeal in *Tan Sri Dato' Hj Lamin bin Hj Mohd Yunus v Bursa Malaysia Securities Bhd* at p 188 para [28]; H
- (b) the LOU was in breach of the Companies Act and therefore was void for illegality; and I
- (c) it was mandatory for the appellant to have delisted Wintoni upon it being wound up.

A OUR DECISION

[6] Based on the narrative of the facts above, in essence, it can be seen that the position taken by the respondent is, he is not duty bound as liquidator to prepare the financial statements as directed by the appellant and that the de-listing of Wintoni upon its winding up is not an option premised on specific provisions of the Companies Act and the CMSA which we will be adverting to.

[7] The appellant, on the other hand, submitted that at the crux of this appeal is the question of who is responsible, during the period when a winding up order is in place and a liquidator is appointed, for ensuring the continued compliance of the ACE LR by a listed issuer, including the preparation of financial statements which are prepared not for the appellant's benefit but is a fundamental obligation of listed companies for the benefit of the public investor. The appellant argued that to this question, the CMSA and the Companies Act are not inconsistent with each other and should be read concordant with each other.

IS DELISTING MANDATORY UNDER R 16.11(2), ACE LR

[8] At the heart of this appeal is the question of the construction to be accorded to r 16.11(2), ACE LR. This brings us spot on to a determination of the grounds of appeal 26 to 31 of the memorandum of appeal of the appellant against the learned judge's finding that it was mandatory for the appellant to have delisted Wintoni upon the making of the winding up order.

[9] For ease of comprehension, it is necessary to reproduce in extenso r 16.11 ACE LR which reads as follows:

16.11 Delisting by the Exchange

- G (1) The *Exchange may at any time delisted corporation* or listed securities *from the Official List in any of the following circumstances:*
- H (a) where the listed corporation fails to comply with these Requirements, subject to consultation with the SC;
- H (b) in other circumstances as provided under Rules 8.03, 8.03A, 8.04, 8.05, 9.28 and paragraph 2.0 of Guidance Note 20, upon which the Exchange will notify the SC of the same;
[Cross reference: Guidance Note 20]
- I (c) upon the delisting of the listed corporation or the delistin of such securities on another stock exchange;
- (d) in circumstances provided under Rule 4.19(5), subject to consultation with the SC; or
- (e) where in the opinion of the Exchange, circumstances exist which do

- not warrant the continued listing of a listed corporation or any class of its listed securities, subject to consultation with the SC where applicable. A
- (2) *The Exchange shall delist a listed corporation in any one of the following circumstances:* B
- (a) pursuant to a directive, requirement or condition imposed by the SC, after which the Exchange will notify the SC of the decision to delist;
- (b) upon the maturity or expiry of a class or securities; C
- (c) upon the commencement of a voluntary winding up of a listed corporation in accordance with the Companies Act; or
- (d) *upon a winding up order being made against a listed corporation.*
- (3) For the purpose of sub-Rule 1(a) above, failure to comply with these Requirements will exclude failure to comply with Rules 8.03, 8.04, 8.05 and 9.28. D
- [Cross reference: Guidance Notes 2 and 3] (Emphasis added.)
- [10] The learned judge found that it was mandatory for the appellant, pursuant to r 16.11(2), ACE LR, to immediately delist Wintoni upon it being wound up as is reflected in His Lordship's findings as follows: E
- [40] Berhubung isu ini juga, adalah penting untuk syarikat yang telah dikeluarkan perintah penggulangan seperti Wintoni untuk dibatalkan dari penyenaian bagi melindungi pelabur dan bakal pelabur. Justeru itu perkataan 'shall' di bawah Peraturan 16.11(2) tersebut hendaklah bersifat mandatori. F
- [41] Di sini, tindakan responden yang tidak mematuhi Peraturan 16.11(2) tetap mengambil tindakan terhadap pemohon kerana tidak menyediakan 'Penyata Kewangan Tertunggak' saya dapati, adalah suatu tindakan yang tidak munasabah. G
- [11] Counsel for the appellant submitted that the learned judge had erred by placing undue emphasis on the word 'shall' appearing in r 16.11(2), ACE LR arguing that a strict interpretation of the said rule would mean that the appellant has no option but to delist Wintoni despite the fact there was ongoing challenge against the winding up order which may later be set aside which would have caused serious inconvenience or injustice and prejudice to Wintoni and to the public investor as Wintoni would then have lost its listing status without reason. To bolster its contention that the word 'shall' in a legal provision does not necessarily connote that it is mandatory but rather, the construction therein depends on the intention of legislature, the facts and circumstances of the case and the injustice which will be brought if interpreted in a mandatory manner, counsel for the appellant relied on the following two apex court authorities of: H
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- A (a) *Hee Nyuk Fook v Public Prosecutor* [1988] 2 MLJ 360 where Syed Agil Barakbah SCJ (as he then was) (delivering the judgment of the Supreme Court) at p 362 held as follows:

B [n]o hard and fast rule can be laid down because it depends on the facts circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and *the serious inconvenience or injustice which may result in treating the provision one way or the other.*

- C (b) *Benjamin William Hawkes v Public Prosecutor* [2020] 5 MLJ 417 at paras 43–49 of the report, where among others, it is observed the Federal Court referred to other Federal Court authorities, including *Hee Nyuk Fook* and at p 417 para [49], opined ‘It is clearly untenable in this case to allude to the word ‘shall’ as mandatory, thus stultifying the justice of the case, when a document was not delivered to the accused persons before the commencement of the trial’; and

- D (c) *Ho Kean Pin v Malayan Banking Berhad & Anor* [2020] MLJU 1435 at para 23 where the High Court followed the principle in the superior court authority of *Hee Nyuk Fook*.

E [12] Counsel for the appellant further submitted that r 16.11(2), ACE LR must be read in conjunction with r 2.07(2), ACE LR which reads as follows:

2.07 Waivers and modifications

- F (1) The Exchange requires strict compliance with these Requirements.
- G (2) Notwithstanding sub-Rule (1) above, the Exchange may at any time, waive or modify compliance with a Requirement or any part of a Requirement. If the Exchange waives or modifies compliance with a Requirement or part of a Requirement subject to a condition, the condition must be complied with or the waiver or modification of compliance to be effective.

H Counsel argued that r 2.07(2) empowers the appellant to modify and/or waive compliance of r 16.11(2), ACE LR.

I [13] Further, counsel for the appellant submitted that the exercise of discretion by the appellant not to delist Wintoni upon the winding up order is consistent with the appellant’s statutory duties under s 11 of the CMSA to act in the public interest for the protection of investors as spelled out here:

11 Duties of exchange

- (1) For the purposes of this section, sections 12, 13 and 27:
- (a) ‘exchange’ refers to a stock exchange or a derivatives exchange; and

- (b) 'relevant person' means a participating organization or an affiliate. **A**
- (2) It shall be the duty of an exchange to ensure, so far as may be reasonably practicable, an orderly and fair market in the securities or derivatives that are traded through its facilities.
- (3) In performing its duty under subsection (2), the exchange shall: **B**
- (a) *act in the public interest having particular regard to the need for the protection of investors*; and
- (b) ensure that where any interests that is required to serve under any law relating to corporations conflict with the interest referred to in paragraph (a), the latter shall prevail. (Emphasis added.) **C**

[14] With respect, we are unable to agree with the above submission of the appellant as we find the arguments are flawed on the facts and circumstances of this case. Instead, we find there is merit in the submission of counsel for the respondent in stating that: **D**

- (i) there is a difference between rr 16.11(1) and 16.11(2), ACE LR when seen from the prescribed circumstances where the appellant 'may delist' and 'shall delist' as specified respectively in para 9 above; **E**
- (ii) the drafters of the ACE LR clearly distinguish the circumstances where discretion can be exercised when it employs the word 'may' and where the word 'shall' is employed, mandatory requirement for 'delisting' becomes non-negotiable; and **F**
- (iii) rr 16.11(1) and 16.11(2), ACE LR exist in successive fashion clearly without a doubt shows the intent of the drafters of the ACE LR. **F**

[15] We can do no better than to replicate the following table drawn by the respondent as shown below to demonstrate the clear intent of legislature on the distinction to be drawn between rr 16.11(1) and 16.11(2), ACE LR as adverted in paragraph 14(i) above: **G**

7. Merujuk kepada Peraturan 16.11 LR pada Sub-Para (1) berbanding dengan Sub-Para (2) menunjukkan perbezaan yang mana niat 'legislature' adalah tepat dan jelas: **H**

	Sub-Para 1	Sub-Para 2
Perkataan	The Exchange may at any time de-list	The Exchange shall de-list
Keadaan-Keadaan	Terdapat peruntukan 5 peristiwa di mana budi bicara dibenarkan sama ada syarikat tersebut wajar disingkirkan penyenaaraan	Terdapat peruntukan 5 peristiwa mewajibkan Perayu menyebabkan penyingkiran syarikat daripada penyenaaraan

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- A [16] The proper mode of interpretation to be adopted when the word used in the legislation is precise with no tinge of ambiguity at all, in our judgment, is the literal and strict interpretation as opposed to the purposive approach as enunciated by the Federal Court in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1 at pp 21–22 para [33] as follows:
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C [33] In the process of discovering the true intention of the Legislature, the court is also duty bound to adopt an approach promoting the purpose or object underlying that particular statute. It is a well established principle that the purposive approach to the interpretation of legislation only applies where doubt arises from the terms or words employed by the legislation. Where the words used are precise and unambiguous, then the literal and strict construction or plain meaning rule will apply.

- D [17] In so far as the authorities relied on by the counsel for the appellant on the construction of whether the word ‘shall’ in a provision is to be construed as mandatory or directory, as pointed out by counsel for the respondent, they can be distinguished in that none of the cases, unlike the legal provision before us which involved two subparagraphs (sub-paras 1 and 2), one following the other, *critically qualified by the prescribed circumstances of when delisting is an act of discretion* (sub para 1) *and when it is otherwise* (sub para 2) within one legal provision (r 16.11, ACE LR). As night follows day, one provision stands in stark contrast with the other, as they are vividly presented in para 15 above. For clarity, as to the difference in the intention of the legal draftsman, in *Hee Nyuk Fook*, the Supreme Court was confronted with the interpretation of the word ‘shall’ in s 158(ii) of the CPC which reads:
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Section 158 states:

- G (i) Any court may alter or add to any charge at any time before judgment is pronounced or in the case of trials by jury or trials with the aid of assessors before the verdict of the jury is returned or the opinions of the assessors are expressed.
- H (ii) Every such alteration or addition shall be read and explained to the accused.

- I [18] In *Benjamin William Hawkes*, the Federal Court had to determine the effect of the word ‘shall’ in s 51A(1) of the CPC as to whether the court was obliged to construe the word as mandatory. The said provision, among others, reads:

[40] Section 51A of the CPC provides:

- (1) The prosecution *shall* before the commencement of the trial deliver to the accused the following documents:

... (Emphasis added.)

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Applying the principles of referencing the word 'shall' to the scheme of the statute and the context in which it is used and adopting the purposive rule of interpretation, the Federal Court held respectively at pp 434 paras [49] and 436 [55] the following:

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[49] It is clearly untenable in this case to allude to the word 'shall' as mandatory, thus stultifying the justice of case, when a document was not delivered to the accused persons before the commencement of the trial.

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[55] Hence, a more liberal meaning must be given to the word 'shall' in s 51A of the CPC rather than a rigid interpretation, so as not to curtail the administration of justice in the manner of a case to be carried out.

Comparing the positioning of the word 'shall' in r 16.11(1) and (2), ACE LR with ss 158(ii) and 51A(1) of the CPC, it is our respectful view that the intention of the legislature is crystal clear and we reiterate that the literal and strict interpretation is to be adopted and not the liberal interpretation, whereby the word 'shall' in r 16.11(2), ACE LR is to be construed as mandatory and not the liberal interpretation urged upon us by counsel for the respondent that the appellant has the discretion not to delist Wintoni, notwithstanding the winding up order.

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[19] In light of the interpretation which we have accorded to r 16.11(2), ACE LR in that the appellant cannot exercise any discretion except to delist Wintoni, a listed corporation upon a winding up order being made, we find it would be irrational, unreasonable and an act of illegality on the part of the appellant to argue that it can exercise its power under r 2.07(2), ACE LR to waive a mandatory requirement of the listing requirements to extricate itself out of the bind.

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[20] Further, it is our respectful view that the argument of the appellant that the exercise of discretion not to delist Wintoni is to act in the public interest for the protection of investors consistent with s 11 of the CMSA runs foul of the mandatory requirement in that the appellant is devoid of any discretion but has to delist Wintoni, a listed corporation, in conformity with the r 16.11(2), ACE LR, whereupon the assets of the company in liquidation are vested to the respondent for settlement of the creditors. This, in our respectful view would be consistent with the legal regime under the Companies Act that upon the winding up of a company, the power of a director ceases to operate because a liquidator is appointed by the court pursuant to s 477 of the Companies Act; the liquidator takes custody of the assets of the company in liquidation pursuant to s 483; directors are required to provide the liquidator with particulars of the company's assets, debts and liabilities under s 484; and under

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A s 489 of the same Act, as soon as practicable after the making of the winding up order, the liquidator ‘shall’ take charge of the assets and sell them off to pay the creditors and any surplus after payments will be distributed to contributories (shareholders).

B [21] Against the backdrop of our explanation, we therefore find there is no error in the learned judge’s finding referred in para 10 above as the finding was arrived at after His Lordship firstly, made a comparison between the provisions of rr 16.11(1) and 16.11(2), ACE LR and noted there is a difference in the usage of the word ‘shall’ in r 16.11(2) ‘adalah bersifat mandatori?’ whereas r C 16.11(1), employs the usage of the word ‘may’ where ‘budi bicara [di]berikan kepada responden’.

D [22] Secondly, the learned judge reasoned that it would in a manner of speaking illogical except to construe that ‘[37] ... Pengasingan 2 kategori (Peraturan 16.11(1) yang menggunakan ‘may’ dan Peraturan 16.11(2) yang menggunakan ‘shall’) ini jelas menunjukkan penggubal peraturan ini ingin menjadikan perkataan ‘shall’ di bawah Peraturan 16.11(2) sebagai mandatori’.

E PURPOSE AND EFFECT OF THE LOU

F [23] We will now revert to the differing positions held by the appellant and the respondent with respect to the purpose and effect of the LOU. Counsel for the appellant submitted that the respondent: (i) had undertaken to comply with the ACE LR in its entirety, without exception, qualification or condition; (ii) had agreed to the continued listing of Wintoni and had executed the LOU in consideration of the same; (iii) had not requested for Wintoni to be delisted but had instead assumed the obligations to comply with the ACE LR to ensure that Wintoni remained listed and that it was only after the LC’s Decision was issued that the respondent reneged on his position; (iv) held the LOU is expressed in an unconditional and unequivocal language that the respondent undertakes to comply with the ACE LR and there was no basis for the learned judge to accept in the face of such clearly expressed terms that the LOU was for the purpose of gaining access to the website; and (v) held the view that the contention that the LOU was to facilitate access to the appellant’s website and the learned judge’s acceptance of the same is wholly inconsistent with the learned judge’s finding that it is mandatory for the appellant to immediately delist Wintoni upon the winding up order being granted because access to the appellant’s website is premised on Wintoni continuing to be listed.

I [24] In our judgment, points (i) to (iv) in para 23 of the appellant’s submission above can be rebutted by carefully scrutinising the contents of the LOU which is spelled out in para 3(g) above. It is correct that by the LOU, the respondent, in consideration of the appellant allowing the continued listing of

Wintoni, undertakes and agrees to comply with the ACE LR. However, it is not a blanket, unqualified and unconditional undertaking; on the contrary the compliance of the undertaking by the respondent of the ACE LCR, inclusive of any amendment, in unequivocal terms is qualified by the words ‘in so far as the same apply to me’.

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[25] We have no issue with the AC’s Decision that pursuant to s 480 of the Companies Act, the respondent has to observe the requirements imposed on him as liquidator by any written law which would include the CMSA and the ACE LR. However, for the reasons we have stated, in our judgment, it is mandatory for the appellant to immediately delist Wintoni from the official list upon the winding up order being granted under r 16.11(2), ACE LR. Given our finding on the mandatory requirement to delist Wintoni, it necessarily follows that: (a) there is no duty imposed on the respondent to ensure Wintoni’s compliance of timely issuance of the financial statements pursuant to r 2.05(2)(a), ACE LR to comply with rr 9.22 and 9.23, ACE LR as it was the LC’s Decision that these obligations only remain in place as long as Wintoni remains listed; and (b) neither can it be said that the respondent has breached r 2.22(3)(a) and (b), ACE LR due to Wintoni’s failure to announce or issue the financial statements as the LC found and upheld by the AC because the respondent had provided the LOU to the appellant in his capacity as a controlling person pursuant to r 2.22, ACE LR.

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[26] Further, given our finding, in respect of point (v) in para 23 of the appellant’s submission above, with respect, we were unable to agree with the learned judge only to the extent that the LOU was for the purpose of gaining access to the website. Here, the trite principle of contemporaneity of documents as submitted by counsel for the appellant is preferred as enunciated in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 (FC); *Guan Teik Sdn Bhd v Hj Mohd Noor bin Hj Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324 (CA).

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[27] We find purely on the grounds of appeal deliberated above it is sufficient to dispose of the appeal. We agreed with the finding of the learned judge that the LC’s decision and the AC’s decision are tainted with illegality (‘the decision maker must understand correctly the law that regulates his decision making power and give effect to it’), error of law (‘misconstrues the terms of any relevant statute’, acting in excess of statutory authority) and irrationality (Wednesbury unreasonableness) such that the said decisions are amenable to judicial review and accordingly, the learned judge correctly allowed the judicial review application. In doing so the learned judge acted in accordance with the established legal principles governing judicial review applications laid in the Federal Court cases of *Akira Sales & Services (M) Sdn Bhd v Nadiyah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 2 CLJ 513; *Majlis*

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- A** *Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65; *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union* [1995] 2 MLJ 317 and *Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA))* [2018] 2 MLJ 738 (CA) at p 754 paras [39] and [41].
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CONCLUSION

- C** [28] For all the foregoing reasons, we are of the considered view that there are no merits in the appeal which warranted appellate intervention. In the premises we unanimously dismissed the appeal with costs and affirmed the decision of the High Court dated 15 June 2020.
- D** *Appeal dismissed and High Court's decision affirmed.*

Reported by Ashok Kumar

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